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Attorneys For Real Party In Interest

TULARE COUNTY SUPERIOR COURTS
STATE OF CALIFORNIA, VISALIA DIVISION

In Re SEARCH WARRANT #013487

YORAI BENZEEVI,

Moving Party,

v.

SUPERIOR COURT OF THE COUNTY OF
TULARE,

Respondent,

TULARE COUNTY DISTRICT ATTORNEY,

Real Part in Interest.

CASE NO: _____

SUPPLEMENTAL POINTS AND
AUTHORITIES REGARDING
EVIDENTIARY HEARING FOR
MOTION TO RETURN PROPERTY

Date: November 9th, 2018
Time: 2:00 pm
Dept: 13

Respondent, the People of the State of California, by and through their attorneys, TIM WARD, District Attorney, and TREVOR HOLLY, Deputy District Attorney, submit this SUPPLEMENTAL POINTS AND AUTHORITIES REGARDING EVIDENTIARY HEARING FOR MOTION TO RETURN PROPERTY related to search warrant #013487. This motion is based upon the pleadings, points and authorities, evidence, and argument presented at the hearing of the matter.

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PROCEDURAL HISTORY

This matter was last heard on 10/05/18. The Court then allowed the People to present supplemental briefing as to the proper procedure of the evidentiary hearing and the tracing of funds, due by 10/19/18.

SUPPLEMENTAL STATEMENT OF FACTS¹

Linda Wilburn stated in a recorded interview that she had resigned from the TRMC Board on 08/23/17 effective 12:00 p.m. and that she had not requested to move the time of her resignation forward to the 24th and she had no reason to do so. After that last court date, Mrs. Wilburn was interviewed by a private investigator who told her that he was working for Dr. Benzeevi's legal team. He showed her a text to Bruce Greene from her phone dated 3:56 08/23/17 that stated that she wished to move her resignation date from 08/23/17 12:00 p.m. to 08/24/17 8:00 a.m. Mrs. Wilburn granted BOI Investigators permission to retrieve the text from her phone and the texts were logged into evidence. Mrs. Wilburn stated that she does not remember sending the text. Investigation into this matter continues.

ARGUMENT AND AUTHORITY

I. AN EVIDENTIARY HEARING UNDER THE RULES OF CRIMINAL PROCEDURE MUST BE HELD

Statutory law and case law clearly establish that stolen or embezzled property should be seized and returned to its rightful owner (PC § 1407, PC § 1408, and PC § 1409). "Clearly, the People have the right to detain any property which it is unlawful to possess.." (*People v, Superior Court (McGraw)* (1979) 100 Cal. App. 3d 154, 157). However, a subject who has

¹ A full statement of facts was submitted in our previous motion. Out of respect for judicial economy, we have omitted it here.

1
2 had property seized does have a due process right to an evidentiary hearing. (*Ensoniq Corp. v.*
3 *Superior Court* (1998) 65 Cal. App. 4th 1537, 1549).

4 A hearing must be held at which relevant evidence on the issue can be presented.
5 (*People v. Superior Court (McGraw)* (1979) 100 Cal. App. 3d 154,159) A hearing is a
6 proceeding of relative formality with definite issues of fact or law to be tried, in which
7 witnesses are heard and evidence is presented. (Black's Law Dictionary, 6th Ed). "A hearing
8 is generally understood to be a proceeding where evidence is taken to the end of determining
9 an issue of fact and a decision made on the basis of that evidence. (*People v. Ivenditti* (1969)
10 Cal. App. 2d 178, 180). Therefore, the People are requesting a full hearing, with the
11 opportunity to call sufficient witnesses and present competent evidence that the funds at issue
12 were unlawfully possessed by Dr. Benzeevi.

13 The CA. Supreme Court has ruled that determinations of privilege regarding
14 documents seized via search warrants are criminal special proceedings (*People v. Superior*
15 *Court (Laff)* (2001) 107 Cal. Rptr. 2d 323, 342, 343). This is because those proceedings deal
16 with criminal warrants which are governed by Part 2, Title 12 of the Penal Code. Here, the
17 search warrants were authorized under PC § 1524(a) and the motion to return property has
18 been made under PC § 1536 and PC § 1540. Therefore, the proceeding is criminal in nature
19 and should move forward under the rules of criminal procedure.

20 II. THE BURDEN OF PROOF AND E.C. § 637

21

22 Regarding the presumption of ownership in Evidence Code section 637, the appellate
23 court in McGraw stated:

24
25 "Such a presumption assumes the existence of the presumed fact "unless and
26 until evidence is introduced which would support a finding of its nonexistence, in
27 which case the trier of fact shall determine the existence or nonexistence of the
28 presumed fact from the evidence and without regard to the presumption." (Evid. Code,
§ 604.) Thus, the subject property is presumed to be owned by the real parties in

SUPPLEMENTAL POINTS AND AUTHORITIES

1 interest until the state has presented evidence which would support a finding that real
2 parties did not in fact own the property. The People would be required to prove the
3 property was stolen by a preponderance of the evidence, as in all determinations of
4 ownership. All relevant evidence on the issue would be admissible.”
5 (*McGraw*, supra, 100 Cal.App.3d at p. 159.)
6

7 Evidence Code section 637 provides: “The things which a person possesses are
8 presumed to be owned by him.” Such a presumption, however, is rebuttable and may be
9 controverted. (*Thorne v. McKinley Brothers* (1936) 5 Cal.2d 704, 708.) This presumption “has
10 been said to be the lowest species of evidence, which may be overcome by showing the
11 character of the possession.” (*Bohn v. Gruver* (1931) 111 Cal.App. 386, 392, italics added.)
12 This presumption only applies to title. Once it has been established that the money was
13 unlawfully obtained, Dr. Benzeevi is not entitled to any presumption of ownership.
14 Therefore, he is not entitled to any presumption that the funds in his account are the proceeds
15 of legitimate activity once it has been established that the account received unlawfully
16 obtained funds.

17 III. THE FUNGIBILITY OF MONEY DOES NOT PREVENT IT FROM BEING 18 TRACED.

19 It is undisputed that two million four hundred thousand dollars derived from the Celtic
20 transaction was deposited into Dr. Benzeevi’s personal account. This money was mixed with
21 approximately two million five hundred thousand dollars of pre-existing money in the
22 account. There is no dispute that from the time of the deposit until the time of the seizure, the
23 balance on the account never dropped below the seized amount, \$937,931.04.

24 Dr. Benzeevi has claimed that because of the fungibility of money it is impossible to
25 establish that the money seized is identical to the money stolen. Tracing the proceeds of
26 illegally obtained funds has a long history of juror prudence in both federal and state law,
27 due to the necessity of tracing funds for money laundering cases, drug proceeds, and the
28 proceeds of other illegal transactions. It is well established that there is no need that identical
money be traced. (*U.S. v. Real Prop. Located at 6415 N. Harrison Ave., Fresno* (2011) E.D.

1 Cal. June 28, 2011, *U.S. v. Check No. 25128 in Amount of \$58,654.11* (9th Cir. 1997) 122 F.
2 3d 1263, 1264). Commingling unlawful proceeds with legitimate proceeds cannot “clean”
3 money from derived from criminal activity. (*U.S. v. Rutgard* (9th Cir. 1996) 116 F. 3d 1270,
4 1292, *U.S. v. Walsh* (2d Cir. 2013) 712 F. 3d 119, 124).

5 In *Banco Cafetero Panama* the Court stated that: “The cash in the hands of the bank
6 does not cease to be “traceable proceeds” just because it is commingled with the bank’s other
7 cash” (*United States v. Banco Cafetero Panama*, (2nd Cir. 1986) 797 F.2d 1154, 1161). *Banco*
8 *Cafetero* established several ways that the proceeds of illegal activity may be traced, one of
9 which is the “lowest intermediate balance” rule as stated in the *Restatement (Second) of*
10 *Trusts* § 202(1). The *Restatement* notes that when funds are wrongfully commingled, the
11 beneficiary is entitled to an equitable lien on both the funds remaining in the account, and any
12 part subsequently withdrawn in excess of the funds remaining in the account (*Restatement*
13 (*Second*) of *Trusts* § 202 comment j (1959)).

14 California Courts have also recognized that fungibility of money and have adopted
15 federal guidelines for tracing unlawful funds. (*People v. Mays* (2007) 148 Cal. App. 4th 13,
16 32). Both Federal and State Courts have reasoned that requiring identical funds be traced
17 would effectively allow a defendant to evade forfeiture and money laundering charges by
18 commingling funds, thus evading the intent of the law. (*Mays, supra*, 148 Cal. App. 4th, 13,
19 27, *United States v. Banco Cafetero Panama*, (2nd Cir. 1986) 797 F.2d 1154, 1161 *U.S. v.*
20 *Rutgard* (9th Cir. 1996) 116 F. 3d 1270, 1292, *U.S. v. Walsh* (2d Cir. 2013) 712 F. 3d 119,
21 124). It is clear that the law of California mandates that unlawfully obtained property be
22 seized and preserved for its lawful owners. (PC § 1524(a), PC § 1536, PC § 1407, PC § 1408,
23 PC § 1409, *People v. Superior Court (McGraw)* (1979) 100 Cal. App. 3d 154). Therefore, the
24 Court should apply the well established rules regarding tracing money seized pursuant to PC §
25 1524(a).

26 Dr. Benzeevi cannot claim that the funds in his account, or subsequent deposits,
27 somehow “cleansed” the funds unlawfully taken in the Celtic transaction. Pursuant to *Banco*
28 *Cafetero*, after the stolen money was deposited into the account, it remained in the account
(*United States v. Banco Cafetero Panama*, (2nd Cir. 1986) 797 F.2d 1154, 1161). The only
way the account could be “cleansed” is by drawing down the account and then depositing new
funds. Here, the lowest recorded balance was \$937,931.04, which is the amount that was

1 seized. Therefore, all of the funds seized represent stolen funds and cannot be returned to the
2 one who stole them.
3

4
5 **CONCLUSION**
6

7 The Court should hold an evidentiary hearing as to the seized funds. The People have
8 a right to a full evidentiary hearing on the matter, with the opportunity to present witnesses
9 and evidence, and are confident that there is sufficient evidence to establish that the funds
10 seized from Dr. Benzeevi's bank account were unlawfully obtained by him and that they are
11 the proceeds of theft and fraud. Therefore, the People respectfully request the Court set a date,
12 or series of dates, providing sufficient time for the matter to be heard.

13 Dated: October 19th, 2018
14

15 Respectfully submitted,

16 TIM WARD
17 DISTRICT ATTORNEY

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19 TREVOR HOLLY
20 DEPUTY DISTRICT ATTORNEY
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